RECOMMENDATIONS TO EXPEDITE MORTGAGE REGISTRATION UNDER SIGUEAL EL-SHAKSI

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TABLE OF CONTENTS

ACRONYMS

EDO	ESA District Office
EFSP	Egypt Financial Services Project
EHFC	Egyptian Housing Finance Company
EPO	ESA Provincial Office
ESA	Egyptian General Survey Authority
GIS	Geographic Information System
GO	Governorate Office
GOE	Government of Egypt
LIS	Land Information System
MFA	Mortgage Finance Authority
MOF	Ministry of Finance
MOH	Ministry of Housing, Utilities and Urban Communities
MOI	Ministry of Investment
MOJ	Ministry of Justice
MSAD	Ministry of State for Administrative Development
NCA	New Communities Agency
RAC	Registration Advisory Committee
REPD	Real Estate Publicity Department
RETA	Real Estate Taxation Authority
RO	Registration Office
RFP	Request for Proposal
TDL	Training Development Laboratory
USAID	United States Agency for International Development
WB	World Bank

Executive Summary

This report outlines certain measure that can be implemented to simplify the registration of mortgages and other documents under the so-called “deeds” system. The author concludes this is not a deeds system at all, but a registration system containing both curtain and mirror guarantees, and where all original copies of registered documents are retained by the registration office. Since the *Sigueal El-Shaksi* system is fundamentally a true registration system, it should be recognized as such.

The *Sigueal El-Shaksi* system is in essence a registration system, so the real problem with the system is not that it is a deeds system or that the index is by name, but that it is set up in books by year. If the name index were set up with a page for each letter of the alphabet showing all documents for all years for persons by alphabetical listing, then there would be little problem in finding the required information regarding a parcel of real estate. However, because the index is set up in books by year, and it needs to be reorganized. If the index needs to be reorganized in any case, then the proper thing to do would be follow the modern practice and set the index up by parcel. The parcel indices should be set up as a database that is shared by both the EDO and the REPD.

Were the indices reorganized by parcel, the registration office would be able to search one book very quickly for all transactions affecting the property and would not need to limit the search to a specified time frame. This would result in a more accurate and complete list of transactions in the certificate giving a requesting finance company better information to assess its risk in extending mortgage financing.

It would expedite the registration of mortgages if the REPD would assess the productivity of employees based upon transactions completed and registered, rather than on how many preliminary, internal application numbers are worked on. This would not only remove the incentive for rejection of applications, it would encourage the completion of the registration of documents.

As part of this process, standards should be developed to recognize that certain variations in documents and many differences between documents drafted by real estate professionals, which differ from information at the REPD, do not affect the validity of transaction and should not be grounds for the rejection of mortgages and other transactions.

An REPD directive should be issued eliminating a review of mortgage transactions where there is no change in the geographic configuration of the property.

The instructions should be amended to allow both the registration of mortgages and the termination of mortgages by mail without personal appearance by a representative of the mortgage company to verify signatures.

Article 43 of the Law No. 114 (1946) as amended (*Sigueal El-Shaksi*) declares a mortgage as void after ten years, which is not in keeping with modern mortgage practice. The ten-year limitation is unreasonable for mortgages, which as the industry grows and financing terms lengthen, will cause great inconvenience to the mortgage companies and in some situations unnecessary loss of security.

Because the system of *Sigueal El-Shaksi* is a registration system[1] there is little reason for either an owner or lender's policy of title insurance to protect against undiscovered rights in the real estate.

It appears that no installment sales contracts in the new communities have, in fact, been registered, and there is no indication how such transactions would be dealt with by the REPD. Given the fact that the REPD has such problems understanding mortgage finance transactions, as discussed earlier in this report, there is little likelihood that the REPD will have a unified, well-considered method for the registration of such transactions.

The EFS Project needs to know much more about the installment sales contracts being used in Egypt. It requires the knowledge of the structure of the contracts, the rights of the seller to enforce in case of default, the rights of the purchasers, and needs to know how the REPD either already handles such contracts, or how it intends to handle them. Only then can a strategy for implementing the substitution of mortgage financing for installment sales contracts be properly planned.

[1] The system is referred to a deeds system, but in my opinion, it is actually a registration system, since the blue deed in the registry in effect certifies the owner and shows all outstanding encumbrances. There is never a reason once a parcel of real estate is registered in the system to go back and examine the history of conveyances. The fact that the index is set up according to name does not change my opinion. The determining factors are that the system includes the mirror guarantee, that is that the blue deed shows all outstanding instruments affecting title, the curtain guarantee, that one need not refer to rights not disclosed by the blue deed, and that all original documents are kept in the registry and not returned to the parties to the transaction.

Introduction

Sigueal El-Shaksi

In 1946, Egypt adopted a system for maintaining land and real estate records, which is codified in Law No. 114 (1946) as amended (*Sigueal El-Shaksi*). This system has been characterized as a deeds system, though it varies dramatically from a true deeds system. A true deeds system is a public repository for real estate records that relies on a minimal amount of inspection from the governmental administrative authority which maintains the records. The governmental review of documents in a deeds system is customarily limited to determining that the document is complete and meets any formal statutory requirements for recording, which might include:

- type and size of paper,
- clarity of the document,
- that the type of document is clearly indicated,
- that the document contains original signatures, and
- support by the appropriate notarial acts such as acknowledgment, verification, or oath, and
- who drafted the document.

If these requirements are met, the recorder estimates and charges the correct fees, assigns the document a sequential number, the recording date and time, and indexes the document as required by law. Generally, exact copies of each document are maintained in the recording office and the original is returned to the party entitled to the document. The essential feature of such a system is that the government makes no determination that the parties to the document have any right to enter into the purported transaction. No assessment is made by the government as to the validity of the document or that it has been executed by persons having any right, title or interest in the property described in the document. Local practices vary, but generally, anyone interested in determining the status of title at any given time must examine all of the documents, or an abstract setting out the essential information in the document, over the history of transactions for the parcel in order to form his own opinion as to the state the of title. Recording a document in a deeds system is a relatively simple matter. Thus, the recorder can in most cases, instantly determine that the document is recordable and accept the document for recording. The indexing of the document takes no more than a few days.

The *Sigueal El-Shaksi* system in Egypt is much more complicated than a true deeds system. The government through the Real Estate Publicity and Notarization Department (REPD) under the auspices of the Ministry of Justice, actually examines documents and chains of documents, to determine the owner. The process has been well described in the Gaynor report of April 2005[2] and the Task II Inception report[3]. The government examination and determination of ownership makes *Sigueal El-Shaksi* a system that is very close to a title registration system. In addition, all original documents are kept by the registration office, which is more like a registration system than a deed system. The system is burdened by bureaucracy and is devoid of the market-driven efficiencies of true deeds systems where the private sector uses the records in the system to render an opinion of title status.

[2] See Gaynor Report (April 2005) p. 22 *et seq*.
[3] See "Property and Registration Law and Their Operation in Egypt: Inception Report (May 2005) p. 27 *et seq*.

The *Sigueal El-Shaksi* system is a product of a history that can be said to have commenced with a legal committee report in 1904 that recommended that Egypt adopt a title registration system. From 1917 to 1921, under the guidance of Director General of the Egyptian Survey Authority (ESA) and Deputy Minister of Finance, Sir Ernest Dawson, a personal registration (recordation) system was developed that took effect on January 1, 1924 and was implemented by ESA. In an attempt to unify the legal and the surveying aspects, (and at the same time exclude the courts) recordation/registration Law No. 114 (1946), as amended (*Sigueal El-Shaksi*), was passed and thus the REPD was created. But the law failed to unify the surveying and legal aspects. The *Sigueal El-Shaksi* system was intended to be a transition from the 1924 system to a title registration system.

In 1964, Law No. 142 was adopted, containing attributes of a true title registration system. However, it has never been implemented in urban areas and has been implemented in approximately 70 to 80% of rural areas[4] with marginal success. The transitional nature of the *Sigueal El-Shaksi* system is evident in the "examination of title" by the REPD. A document referred to as the blue deed[5] is kept in the registry office and a copy stamped by the REPD is issued to the owner.

Registration of Mortgages under Sigueal El-Shaksi

Pursuant to Article 6 of the Mortgage Finance Law (2001), a finance agreement is entered into between the seller (if this is purchase financing), the buyer, and a financier. This is the so-called 'tri-partite finance agreement'. The basic structure of the transaction is a seller agrees to sell to the buyer in installments over an agreed period of time. The seller then enters into an agreement with the financier assigning the right of installments to the financier. The seller commits to register the realty in the name of the buyer, and the buyer commits to "record" the lien securing the price.

Article 6 also provides for non-purchase money financing by stating:

> If finance is for the purpose of investment in building a realty on land owned by the investor, repairing or improving a realty owned thereby, or for other fields (sic), the finance shall be according to an agreement between the investor, the financier and any other person concerned with the agreement.

Article 10 sets out the registration requirements as follows:

> The request to register the real estate security shall be submitted by the financier or investor to the Real Estate Registration Office within the circuit of which the realty is located, comprising the data to be determined in the executive statutes, and attaching the finance agreement as well as the realty title deed.
>
> A final decision in the request for registration shall be issued within a week, after ascertaining the accurate limits of the realty as mentioned in the request and the title deed, or charging the applicant to fulfill the necessary (sic) within a week from the date of submitting the request.

[4] Gaynor Report (April 2005) p. 26.

[5] The author will use this term, since it has become generally recognized by those working on the project, and was in universal use during this trip in discussions and presentations. Early in the project is was referred to as the green deed, and it has been explained that it is in fact blue-green. It appears from a discussion with Rehab Nour, who is developing that, that it has various names in Arabic depending upon the nature of the contract that gave rise to the title. It is best described on p. 12 of the Gaynor Report (April 2005).

> The applicant shall be notified within the aforementioned date of the decision issued in respect thereof, by virtue of a registered letter with acknowledgment of receipt. The decision refusing the request shall be substantiated.

Note that this article contemplates the registration of the real estate security, that is both the rights of the purchaser and the registration of the finance agreement. Article 10 of the Mortgage Finance Law (2001) is not inconsistent with Law No. 114 (1946) as amended (*Sigueal El-Shaksi*). The key bottleneck in the procedure, however, is the requirement to ascertain the accurate limits of the realty. If there is already a blue deed issued for the property and the same property is described in the finance agreement, it is quite redundant to have to send the document to ESA to "ascertain the accurate limits". If this requirement could be disposed of, the entire registration of the real estate security and finance agreement would take less than a week. Of course, if no blue deed has been issued for the property, as described in the deed, the limits of the property would have to be ascertained. Still, this should not necessarily require a site visit[6].

In addition, the following is a description of the process of mortgage registration as related during a visit to the Northern Cairo Central Office[7].

- Mortgage registration applications are submitted at the RO whereas mortgage finance applications are submitted at the central registration office.
- Mortgage applications are forwarded to the EDO, whereas mortgage finance transactions do not require ESA involvement.
- The parties to a mortgage finance transaction go to the notary office first and then submit their application for registration.
- Mortgages have been common for a long time and the registration office knows how to do them, whereas mortgage finance transactions are new based on the Real Estate Finance Law.
- Mortgages have two parties, whereas mortgage finance transactions have three parties (seller, buyer, and lender) as required by the Real Estate Finance Law.
- Three parties sign tripartite finance agreement at notary office.
- Lender submits finance agreement for registration at central registration office.
- If a company is involved in the transaction, the central office checks the companies' registry to verify that the company is in good standing.
- Central office also verifies that the person representing the company has the authority to do so.
- The application is forwarded to the technical review section which verifies:
    - that the contract has been properly drawn up and notarized;

[6] Various scenarios for the registration of a finance agreement are aptly described in a memorandum by Richard M. Gaynor, which is attached to this report as an appendix.

[7] The visit took place February 6, 2006 and was attended by Rick Gaynor, Justin Holl, Jr., Rehab Nour, Sahar El-Helaly. My notes of the meeting are supplemented by relevant comment by Richard M. Gaynor.

- that a “certificate of transactions” and a registered deed (*sanad al mulkaya*) for the property have been submitted; (theoretically these documents would show the same information)

- if the property is a building or apartment, a tax form from the tax department;

- forward the application to the finance section to estimate the value of the property and determine fees (note, this step would be eliminated by flat fee);

- applicant pays fees and provides receipt;

- registration office prepares draft of “finance agreement”; (note, this is different from the tripartite agreement submitted with the application. It is a document prepared by the registry on the same blue paper as is used for registered deeds.)

- verifies with registration office that no applications are pending with regard to the parties or property;

- the finance agreement is “publicized” (publication basically means it is given a number and entered into the register);

- original of the finance agreement is retained in the central registration office and lender receives a copy; and

- central office also takes original registered deed from the owner, keeps it in an archive and makes a notation regarding the mortgage on the original registered deed that is kept in the central office.

Transition to Parcel Based Index

Indices

In the introduction to this report, one of the listed responsibilities of a recording office is to index the documents. The index or indices allow one to search the record and find all the documents necessary to assess the status of title. Without an index, the records are worthless, because as the records increase in number it becomes impossible to find those transactions relevant to the title of a parcel of real estate without some sort of index.

Name Indices

Historically worldwide, the older form of index is one based upon the names of the parties to a transaction. Usually certain pages are assigned for each letter of the alphabet As a transaction is recorded, the name of the grantor, mortgagor or other granting party according to the first letter of the surname is placed on the appropriate page of the index with a cross reference to the document number, the other party or parties to the transaction, the property description, dates and other information that the law requires. The name of the grantee is customarily entered in the same index or a separate index, cross-referencing the name of the grantor and other relevant information. A party purchasing real estate locates the name of the seller in the name index as grantee, then locates seller’s seller as grantee, and so forth, back a specific period of time, as established by law, or until a so-called root of title (land patent, Crown land etc.) is established. This is called running a chain of title. The examiner also notes any documents for which the person was a grantor during the time period between the person’s acquisition of the property and the person’s conveyance of ownership. In this manner, the person locates any mortgages,

servitudes and other rights less than ownership which may affect the property[8]. The examiner should also find any cases where a person in the chain has conveyed the property multiple times. The examiner is then in a position to render an opinion as to the record owner and any outstanding encumbrances.

Parcel or Tract Indices

Many jurisdictions require, or at least allow, indices arranged by parcel. Tracts of land are indexed and when a transaction is recorded at least the document number is listed in this parcel index for the particular property. Such indices often list additional information such as the type of document, the names of the parties, and the date of the transaction. The location of an index is kept according to the parcel, and the process of title examination is greatly simplified. One simply finds the index for the particular parcel and can readily find listed all the documents that have been recorded against this parcel. A title search using a parcel index is much more efficient than using a name index, because all the documents affecting the parcel, including encumbrances, can be identified without searching names of parties. Often such indices are arranged in such a fashion that the chain of title can be observed in the index at a glance.

Sigueal El-Shaksi Index

The present *Sigueal El-Shaksi* System in Egypt is arranged by name, but there is an additional difficulty with the system. In contrast to more user-friendly name indices, which set up particular pages of the index by alphabet, the Egyptian system has a different index for each year with alphabetical arrangement. Therefore, one must ask for a search[9] year by year to find the blue deed for the present owner, though the present owner should supply his/her copy, which the REPD has determined will make it fairly easy to find the title. Finding encumbrances should also be a relatively easy matter, since they should appear as notations on the blue deed. There is no chain of title in the Egyptian system of *Sigueal El-Shaksi*, and in theory one need not research historical records "behind" the blue deed[10]. Where a particular parcel of real estate has been registered in the *Sigueal El-Shaksi* system, the blue document is quite reliable. It is not possible for two blue deeds to exist for the same property in the registry[11].

This raises the question whether switching to a parcel based indexing system would, in fact, make the system more efficient. The answer is yes and no. Since the *Sigueal El-Shaksi* system is almost a registration system, the real problem with the index is not that it is set up by name, but that it is set up in books by year. If the name index were set up with a page for each letter of the alphabet showing all documents for all years for persons by alphabetical listing, then there would be little problem in finding the required information[12]. But it is not, and, thus, reorganization would increase the efficiency of the system[13]. If the index needs to be reorganized in any case, then the proper thing to do would be follow the modern practice and set the index up by parcel[14].

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[8] The manner in which the search is conducted depends largely on how the name index is set up. Where there are grantor and grantee indices, the examiner starts with the present owner, finds the person's name in the grantee index then finds the name of the grantor in the document in the grantee index and runs the chain back. Then the examiner searches each person's name in the grantor index for period where the person was owner to located mortgages, leases etc. Where there is only one name index it is important that the examiner find the present person listed as a grantee, then find his grantor as a grantee, and so on. This is always tedious and where there are not proper cross-indices of the parties to a transaction, the examiner must look at each document to find the relevant information.

[9] The search is performed by the REPD and not by the private sector, as in many jurisdictions.

[10] This is the so-called curtain guarantee that is one of the benefits of a true registration system.

[11] Anecdotal evidence suggests that this is not true for the owner's stamped copy of the blue deed.

[12] Note that searches using movable property registries (there are exceptions such as motor vehicle registries, where searches can often be conducted by name or property ID) are done by name, and they are quite efficient, because they don't require searches by year.

[13] Richard M. Gaynor also points out that the indices are in very poor condition. Gaynor Report (April 2005) p. 23.

[14] Here it should be noted that in the United States most of the States west of the original thirteen colonies have parcel based indices (either required or permissible) as well as name indices. Nobody ever uses the name indices. All private indices i.e. those set up by title insurance companies are parcel based; so-called title plants.

A reorganization of the indices by parcel would make the blue deeds easier to find. The REPD could readily locate all of the documents affecting a parcel, confirm the data, and issue a new blue deed or a notation on an existing one much more quickly. This would apply to the registration of mortgages as well as other documents.

The mutation form in the EDO already organizes all transactions by parcel, so it would not be a complicated process to authorize the EDO mutation form as an official index[15]. The mutation forms include, but are not limited to, the following information[16]:

- Number and date of contract registration,
- Type of transaction,
- Name of grantor in contract,
- Name of grantee in contract,
- Cadastral information,
- Application number and year,
- Easements,
- Transactions with data regarding date and parties.

As pointed out above in the general discussion of parcel indices, they can contain more or less information as required by law ranging from simply listing the document numbers affecting a parcel of real estate to inclusion of dates, parties etc. In this regard the mutation forms maintained by the EDO include the information that more complete parcel indices in deed systems contain. It is suggested that these mutation forms be used as the basis for setting up parcel indices in the registration offices. It appears that to do this would require no change in Law No. 114 (1946) as amended (*Sigueal El-Shaksi*). This law requires indexing, but does not specify the nature of the index.

> Article (4)
>
> Registry offices affiliated to national, mixed, and sharia courts shall be abolished and replaced by real estate registry offices. All documents, registrations, and indices in the former offices and in the land survey department are to be transferred to these offices.
>
> Article (5)
>
> Each real estate registration office shall be exclusively responsible for the registration of the documents of real estates located within its area of competence. If the estates within the area of competence are multiple, each must be registered in the competent office.
>
> Registration made in one of these offices is effective only as regards properties or part thereof located within the real estate and registry office area of competence.

[15] As long as there is a sharing of information between the EDO and the REPD, which would be quite easy with modern technology.
[16] Draft report on existing paper documents being completed by Rehab Nour, Task 2: EFS Project.

> Each office shall prepare an index for all documents registered at its place. Requested real estate certificates shall be issued in accordance with the information included in this index.
>
> The certificates are to specify the registry office where documents were recorded if registration took place prior to the enactment of this law.

No provision of the *Sigueal El-Shaksi* law requires that the index be according to name. The law simply states that indices be created and maintained and refers in the remaining provisions that mention the index to "index books"[17]. With an Executive Regulation the information in mutation forms could be transferred to the REPD and set up as indices complying with the *Sigueal El-Shaksi* law.

This is different than the Sigueal El-Ainee law No. 142, which in Article 5 requires that:

> Attached to each registry shall be a personal *index in alphabetical order* in which each owner shall have a specific record indicating the real estate property owned thereby. Data entered in this index shall be based on the data recorded in the real estate registry[18]. (emphasis added)

The Articles in Law No. 142 as amended need not be amended, because it doesn't require the name index as the only index. I suggest, however, that the Executive Regulations and the Instructions be amended to allow for a parcel index in addition to the name index required by the law[19].

Benefit for Mortgage Financing

One of the requirements for registering a mortgage finance agreement with the central registration office is to procure a certificate of transactions. This is a document issued by the registration office that shows any transactions that have been registered for a particular parcel of real estate. Because the name index in the registration office is set up in books by year it is practice to specify a period that the certificate would cover. The specialists at the registration office then search the name of a prospective mortgagor or owner in each annual book for the period requested. This requires doing the same search over and over, year by year, book-by-book.

If the indices were reorganized by parcel, the registration office would be able to search one book very quickly for all transactions affecting the property and would not need to limit the search to a specified timeframe. This would result in a more accurate and complete list of transactions in the certificate, giving a requesting finance company better information to assess its risk in extending mortgage financing.

Also, when the mortgage transaction is concluded and the transaction is submitted to the registration office, the processing would be expedited because the REPD staff would simply review the parcel index to see all transactions that affect the parcel. Assuming that the transaction would not have to be reviewed by the EDO, the processing to register a sales

[17] Law 114 (1946) (*Sigueal El-Shaksi*) Article 4 "indexes", Article 5 "prepare an index for all documents", Article 6 "prepare indexes", Article 8 "index books", Article 35 "index books" and Article 36 "index books".
[18] See also Law No. 142 (1964) (Sigueal El-Einee) Article 9 and Executive Regulations on *Sigueal El-Ainee* Article 130 and 131.
[19] Note that Sigueal El-Einee is really substantively little different than Sigueal El-Shaksi. The *Sahayfa Akariya* under the Sigueal El-Einee is, in my opinion, different from the blue deed in minor respects.

contract, in case of a purchase financing agreement and the mortgage itself, would take only a couple of days. The information gathering to make the review, and review itself by the registration office, would only take an hour or two.

Share data between EDO and the REPD

The parcel indices should be set up as a database that is shared by both the EDO and the REPD. The EDO does not need to maintain the legal information, but could maintain the index for the REPD. This would be a step toward unifying the functions of the legal and the surveying aspects of registration, which was one of the goals of the passage of the 1946 *Sigueal El-Shaksi* law[20].

Recognize *Sigueal El-Shaksi* as a true Registration System

Since the *Sigueal El-Shaksi* system is fundamentally a true registration system, it should be recognized as such. The blue deed is the equivalent of a certificate of title that one finds in registration systems. When a new application for the registration of a contract from an owner under blue deed is presented to the registration office transferring ownership, the registration office should issue a *Sahayfa Akariya* under the Law No. 142 (1964) to the grantee in the contract without the necessity of further investigation. The *Sahayfa Akariya* would be subject all the outstanding rights and interests that a new blue deed would require. This, in essence, would start the process of first registration under Law No. 142 (1964) on a sporadic basis.

This would not supplant the processes for systematic registration under Law No. 142 (1964), but would expedite the transition that has always been intended[21].

Remove Incentives for Document Rejection

The present registration office procedures for quantifying the productivity of REPD employees, incorporates incentives for rejecting mortgages and other documents[22]. When an application to register a mortgage is submitted to the registration office it is given an internal application number. The mortgage is usually submitted with supporting documentation, which depends upon the details of the transaction. If the documentation is complete, the mortgage is accepted for registration, and given an official application number. If it is rejected, the problems are cured and the mortgage package is resubmitted and given a new internal application number. The productivity of employees in the registration office is measured by how many internal application numbers they work on per month. Therefore, it increases an employee's apparent productivity if a mortgage is rejected, the matter cured (which might be rather simple to do), and a new internal registration number is issued for the package. A common reason for rejection of a mortgage package is that there are minor inconsistencies from document to document in the package. For example, the name of one of the parties might be spelled differently, or addresses might vary slightly from document to document in the package, or there may be minor variance between the documents in the package and the information on record with the REPD.

These types of inconsistencies occur in all jurisdictions with registration systems. Many of them are of a *de minimis* nature and occur quite normally, where documents are drafted by real estate practitioners given the exigencies of real estate markets. These jurisdictions have established so-

[20] Discussion with Mosaad Ibrahim, Advisor to the EFS Project, on March 2, 2006.

[21] Id.

[22] Meeting February 9, 2006 at the Egyptian Housing Finance Company attended by Tamer S. Gaafer, Attorney, Legal Department of the EHFC, Richard M. Gaynor, Justin T. Holl, Jr., and Shamsnoor Abdul Aziz, Senior Legal Advisor of EFS.

called title standards that are applied where, though there may be discrepancies, it is clear that the transaction is legitimate.

It would expedite the registration of mortgages if the REPD would assess the productivity of employees based upon transactions completed and registered, rather than on how many preliminary, internal application numbers are worked on. This would not only remove the incentive for rejection of applications, it would encourage the completion of the registration of documents.

As a part of this process, standards should be developed to recognize that certain variations in documents, and many differences between documents drafted by real estate professionals which differ from information at the REPD, do not affect the validity of transaction, and should not be grounds for the rejection of mortgages and other transactions.

Issue Directive Regarding Mortgage Finance Agreements

Lack of Understanding How to Treat Mortgage Finance Agreements

The Mortgage Finance Law was passed in Egypt in 2001 and mortgage finance companies have started to engage in finance agreements in accordance with the law. At a meeting held at the Northern Cairo Central Registration Office on February 6, 2006, it was explained that although district registration offices deal regularly with mortgages, mortgage finance agreements, which are perceived to be different than mortgages, are not readily understood by the central registration office where they are processed. No REPD directive has been issued explaining how the staff should process these agreements. Procedures are presently being "negotiated", and this may have been the case since the Mortgage Finance Law was passed in 2001.

Need for Directive

The REPD needs to issue a directive establishing procedures for handling mortgage finance agreements, which have been transacted pursuant to the Mortgage Finance Law. There is conceptually little difference between mortgages and mortgage finance agreements and they should be treated the same. A mortgage transaction is simply a transaction by an owner of real estate that has a blue deed granting the real estate as collateral for the loan. The mortgage finance agreement is a variation of this transaction in that in most cases it is a three party agreement:

- setting up an installment sale between the seller and the purchaser,
- transferring the right to payments under the installment agreement from the seller to the lender,
- transferring title to the real estate from the seller to the purchaser, and
- the purchaser granting a mortgage to the lender to secure the payment of the installment payments.

Elements of the Transaction from Registration Point of View

This transaction has two basic elements from the standpoint of registration. The first is that title is transferred from the seller, who already has a registered blue deed. Thus, the registration office needs to go through the normal process of issuing a new blue deed to the purchaser. This transaction will be subject to the tri-partite finance agreement, which should be noted on the new blue deed, as a notation, like any other encumbrance. This part of the transaction should be

treated like any other transfer contract. At this point, the seller has no further right title or interest in the real estate, having assigned its rights to payments to the lender and having transferred the title to the real estate to the purchaser.

The second part of the transaction that is significant from the standpoint of registration is that the purchaser grants the lender a mortgage to secure the installment payments that are part of the finance agreement. The final result is that there is a blue deed in favor of the purchaser, a notation for the finance agreement setting up the installment payments, and a notation for the mortgage to secure those payments. This second part of the transaction is no different than the mortgages, which are readily understood in the district registration offices.

When the installment payments have all been paid, the lender will give a document, which terminates the mortgage, thus eliminating the lender's notation for the mortgage. But what happens with the mortgage finance agreement that still shows as a notation on the purchaser's blue deed? This is just a little tricky, since there are three parties to that agreement: 1) the seller, 2) the lender, and 3) the purchaser. Presumably all three would be named on the purchaser's blue deed for the mortgage finance agreement entry (though the reference to the seller should have been eliminated based upon the assignment of rights to the installments to the lender and transfer of ownership to the purchaser). A termination of the mortgage and the finance agreement by the lender would effectively terminate the mortgage finance agreement as well. Assume that the purchaser's rights and obligations under the mortgage finance agreement merge into the ownership rights. The doctrine of merger states that when a greater right and a lesser right become vested in the same person, the lesser right merges into the greater right, absent intent to the contrary. When the seller's rights and the lenders rights have been terminated, as has been shown, then the only rights and obligations left under the mortgage finance agreement are the purchaser's, which then merge into ownership and the entire agreement can be shown to have been entirely terminated.

The REPD directive should recognize that the assignment of the seller's rights of the installments to the lender and the transfer of ownership to the purchaser completely eliminates the seller's rights in the mortgage finance agreement. The seller should not even be named as a party in the notation for the finance agreement on the purchaser's blue deed. The termination upon full payment by the lender should reference termination of the mortgage finance agreement, as well as the mortgage provided by the purchaser[23].

Parcel Index Shows Transaction at a Glance

Note that the listed documents will show on the mutation form for the real estate and a review of that form would clearly illustrate the termination of all rights in the mortgage finance transaction. The mutation form will show in order of occurrence:

- The mortgage finance agreement on the seller's blue deed,
- The assignment of rights from the seller to the lender,
- The transfer of ownership to the purchaser,
- The issuance of a blue deed to the purchaser,
- The granting of a mortgage from the purchaser to the lender, and

[23] This discussion assumes that all the documents are correctly drafted and clearly indicate which rights are being transferred by each of the parties at the beginning of the transaction and upon payoff. This is a reasonable assumption, though this author has not reviewed any of the forms that have been or are being developed to evidence this transaction.

- The termination of rights in the mortgage and the mortgagor finance agreement from the lender.

This is another reason why a parcel-based index maintained in the REPD office will assist in the processing of mortgages. From this index, it will be readily apparent that the mortgage finance agreement has been terminated upon pay-off and persons' rights and obligations under the tri-partite mortgage finance agreement have been eliminated.

The directive of the REPD explaining how to handle mortgage finance agreements should be issued accordingly.

Eliminate Unnecessary Field Investigation

With a mortgage, the transaction is sent to ESA to conduct its field investigation[24]. This is true even in cases where the property description in the blue deed is identical to the property description in the loan documents. The borrower could not have obtained a blue deed in the first instance without ESA having conducted a field investigation, and so this second investigation for mortgage documents is redundant and completely unnecessary. There is apparently no law or regulation that requires this second review by ESA[25]. A directive should be issued eliminating this second review where there is no change in the geographic configuration of the property.

Apply Existing Registration Office Directives Uniformly

Directives are applied inconsistently from registration office to registration office[26]. One example is a power of attorney from a registered owner to a current purchaser to register a sales/purchase contract. Even when a registered owner is the principle in the power of attorney has died after giving the power of attorney, some registration offices still accept the power of attorney. Other offices will reject the power of attorney and will not allow registration without resolving the inheritance issues raised by the death of the principle. Although it is a general that powers of attorney terminate upon the death or incapacity of the principle, some registration offices, nevertheless, allow continued registration by the attorney. This is based upon the theory that even when there has been a death, the exercise of the power of attorney to register property only benefits the parties and therefore ought to be enforced.

The REPD should issue a directive allowing the recognition of a power of attorney and continue to register documents even though the grantor in the contract has died. Note that both the buyer and the seller during his/her lifetime had appeared before a notary who authenticated the transaction. The signature of the seller on the power of attorney is also attested[27]. Therefore there is no substantive reason for stopping a registration when the seller has no further right, title or interest in the property and has authorized registration of the document of conveyance.

[24] Though not for mortgage finance agreements that are submitted to the Central Registration Office.
[25] Shamsnoor Abdul Aziz, Senior Legal Advisor for the EFS Project, believes that this second review is an historical artifact stemming from a perceived need to control bribery and corruption by calling for a cross review of legal transactions that where signatures were not authenticated by the courts.
[26] The inconsistency was raised at a meeting with Taamir Finance Co. on February 8, 2006 attended by Richard M. Gaynor, Justin T. Holl, Jr. and Shamsnoor Abdul Aziz.
[27] See the Form of Power of Attorney attached to the REPD Instructions for Sigueal El-Shaksi.

Notarization by Mail

Article 19 of REPD Instructions under *Sigueal El-Shaksi* provides that a notarized document can be sent, by mail[28]. However, there must be a personal appearance within ten days to verify the signature. It is important that applications be accepted if presented by mail, and for interests less than ownership there should be no requirement that the signatories appear in person to authenticate the documents.

In modern international mortgage practice, mortgage packages are often submitted by mail, or using more modern technology such as e-filing. This allows the mortgagees to deal in volume out of many offices without the necessity of personal appearance in recording offices. Especially for the termination of mortgages that are signed by officers of the mortgage companies, it would be a great inconvenience if the signatories needed to personally appear to authenticate signatures. A termination of mortgage is a relatively simple instrument whereby the mortgage company and potential liability for the registration office is really not an issue. This is because upon full payment of the debt obligation secured by the mortgage, there is legally no more encumbrance. The termination of mortgage simply clears the record. A mistake or wrongful rejection of the document in the normal course is unlikely to adversely affect any interest in the real estate, because it neither creates rights nor terminates rights. It is the full payment of the debt that legally terminates the mortgage rights. With the payment of the debt, the rights in mortgage are legally extinguished. The termination document is merely a convenient way of clearing the record.

The instructions should be amended to allow both registration of mortgages and the termination of mortgages by mail without personal appearance by a representative of the mortgage company to verify signatures.

Mortgage Is Void after 10 Years

Article 43 of the Law No. 114 (1946) as amended (*Sigueal El-Shaksi*) states that:

> Entry abates if it is not renewed within ten years from its date of accomplishment. The debtor makes new entries if it is legally permissible, which shall be ordered according to its date of occurrence. Every renewal is effective only for ten years from its date of occurrence.

This provision applies to mortgages as well as other rights and obligations. This article is not in keeping with modern mortgage practice. The ten-year limitation is unreasonable for mortgages. As the industry grows and financing terms lengthen, great inconvenience will be caused to the mortgage companies. It will require that they have sophisticated tickler systems to notify that the mortgage right is about to expire by operation of Article 43.

There is a similar, but more immediate problem mentioned at a meeting with the Egyptian Housing Finance Company. Applications to register mortgages expire if the registration is not completed within one year[29].

[28] Admittedly this Article applies to the registration of documents regarding ownership, but there is nothing in the Instructions that indicates that the requirements would be otherwise for applications involving rights less than ownership.

[29] Article 24 of Law No. 114 (1946) as amended (Sigueal El-Shaksi) provides that an application to register shall be null if the document is not registered within one year of recording the application. This provision appears to apply to situations that involve either previous unregistered documents, or perhaps even title based upon adverse possession, though in the latter case there would be no "document".

Title Insurance

There is discussion in Egypt regarding the introduction of title insurance and the Egyptian Insurance Supervisory Authority. The Egyptian Insurance Federation are studying the possibility of developing this insurance product to support the mortgage market. Because the system of *Sigueal El-Shaksi* is a registration system[30], there is little reason for either an owner or lender's policy of title insurance to protect against undiscovered rights in the real estate. From discussions at the Misr Insurance Company, it is apparent that the mortgage industry is looking for guarantees that the mortgaged title will actually be registered as part of completing the financing arrangement. It is uncertain that title insurance companies would provide this coverage given the vicissitudes involved in the registration process. Title insurance usually does not cover known risks, and it is unlikely that the industry would offer such coverage in Egypt[31]. Title insurance relies on ferreting out risk through specialist examiners before issuing a policy and limiting their coverage by excluding discovered risks. In given cases in Egypt, where there is a risk that contracts and ancillary mortgage documents cannot be readily registered, title insurance companies will most likely exclude this risk from coverage in their policy.

It has been suggested that mortgage lending might be expedited by the introduction of 5% escrows held from the funds due a seller to ensure registration[32]. This could potentially create an industry of expediters. This might be a role that title insurance companies would be willing to take on. If so, the title companies would charge a fee for undertaking the registration on behalf of the parties to a mortgage transaction. These duties would raise a contractual or tort liability, but not a liability under a title insurance policy. Separate premiums would be charged for title insurance coverage, and the policies issued (either lender's, owner's or both) would be subject to the known exceptions and all the exclusions, and conditions of coverage that are part of the standard title policy. See memo on title insurance in Appendix 3.

Financing Default and Enforcement

One of the proposals that has been suggested for this project, is to encourage mortgage finance companies to buy developer portfolios of installment sales contracts and substitute mortgage financing. In considering this suggestion, it is important to investigate the enforcement mechanisms available for installment sales contracts in case of default, and contrast available mechanisms to those for foreclosing mortgages pursuant to the Mortgage Finance Law of 2001. A few jurisdictions in the United States treat installment sales contracts as mortgages under the theory that any transaction intended as security for a dept is a mortgage. This is an equitable mortgage theory that would require that the installment sales contract be foreclosed in the same manner as a mortgage. This provides significant protection to a borrower that is unavailable to an installment sales contract purchaser in most jurisdictions.

[30] The system is referred to a deeds system, but in my opinion, it is actually a registration system, since the blue deed in the registry in effect certifies the owner and shows all outstanding encumbrances. There is never a reason once a parcel of real estate is registered in the system to go back and examine the history of conveyances. The fact that the index is set up according to name does not change my opinion. The determining factors are that the system includes the mirror guarantee, which is that the blue deed shows all outstanding instruments affecting title, the curtain guarantee, that one need not refer to rights not disclosed by the blue deed, and that all original documents are kept in the registry and not returned to the parties to the transaction.

[31] In the United States title insurance companies often talk about so-called "gap coverage", i.e. purport to cover insured risks that occur between the time of settlement and the actual registration of the insured interest. However, this is really not part of the title policy coverage at all, because the policy is not issued until the insured right is actually registered. There is coverage in the interval between the settlement and the registration of the insured right where the issuing title insurance company actually handles the closing, and undertakes to record/register the documents. The reason that the title company undertakes the risk at all is that recording/registration is utterly predictable in the United States and the only real risk to the title company is the business risk that the documents are submitted shortly after the settlement. This time period is completely within the control of the title company, or as mentioned, it will not take on the liability.

[32] See Memorandum of Dougal Menelaws entitled "Measures to Expedite Registration and Mitigate Risk to Lenders" dated February 1, 2006.

Due to anecdotal evidence that there have been significant sales by developers to purchasers on installment contracts, it is important to point out issues that may be a factor regarding installment sales contracts. Although this topic is, strictly speaking, beyond the scope of work for this input, it is important to start the discussion. Such land sales contracts play an important role in financing real estate transactions. They bring together purchasers and sellers where a sales transaction would not occur without this type of financing mechanism. Both the seller and the purchaser benefit. The concept is simple and in most jurisdictions is simply a matter of general contract law. An installment sale allows a person to purchase real estate by making payments to a developer/seller in installments over an agreed upon payment schedule. Buyers often prefer this method of financing, because there is no need to obtain expensive or otherwise unavailable financing from institutional lenders to make the real estate purchase. Often buyers are unable to meet qualifications that are imposed by highly regulated institutional mortgage lenders, such as low loan to value rates, stringent appraisal requirements, and/or percentage of payment to income restrictions. Buyers might also avoid additional expense by financing the transaction with a developer through an installment sales contract. For example, mortgage lenders in Egypt are starting to offer, or perhaps require, ancillary products, casualty insurance, decreasing balance life insurance, and perhaps title insurance, that will help reduce the lender's risk[33]. But the costs of these products are passed on to the buyer and raise the price of the loan. The insurance industry has already developed casualty insurance and decreasing term life insurance for the mortgage industry, and these products have been approved by the Ministry of Investment. The Egyptian Insurance Supervisory Authority is looking into the issue of title insurance and is also being examined by the Egyptian Insurance Federation.

Installment land contracts normally allow persons to purchase real estate with a modest down-payment compared to price[34], while at the same time providing the seller with a quick and simple means of retaining the collateral in case of default. In return for the seller-provided financing, the buyer generally agrees to allow the seller to enforce the contract without the necessity of lengthy and costly court involvement.

Structure of transaction

Who owns the land through the period of the sale contract is of fundamental importance to the entire concept[35]. There are two alternatives. The most common alternative is that the seller retains ownership until the buyer pays in full. The second alternative is that the buyer receives a conveyance of ownership upon executing the sale contract, subject to a condition that the ownership right reverts to the seller if there is a default. Upon default, the ownership either automatically reverts to the seller without further action by the seller or the seller must reenter and enforce the reversionary right. It seems like the first alternative is prevalent in Egypt, but this would have to be researched. Generally, the ownership to the land parcel is not transferred by the seller to the purchaser until all payments have been made. Although, the purchaser acquires the right to possess and have full use of the real estate at the time the contract is made.

In order to protect the rights of the buyer, the contract must state that if the buyer fully performs under the contract, the seller is obligated to transfer the ownership to the buyer or release the condition of reversion. To protect the seller, there must be a clause in the contract stating that if the buyer defaults, the seller has the option of declaring the contract and the right of the buyer to possession and use to be terminated. Normally, the seller retains all money paid prior to the default, though this must also be specifically set out in the sales contract.

[33] Meeting February 28, 2006 at Misr Insurance Company with Ahmed A. Arfein, ACII Deputy Chairman of Misr Insurance Company, attended by Kevin O'Brien, Dougal Menelaws, and Justin T. Holl, Jr.
34 Although See Report 29, Sims "Housing Market Assessment for El Maadi, Nasr City, and Sixth of October" p. 15.

[35] It appears that in Egypt the seller retains title and purchase has a equitable right to the title conditioned on making all the installment payments.

Significant issues

If both parties perform according to the contract, the mechanism can be an extremely useful method for financing the purchase of land. However, several critical circumstances must be anticipated at the time the contract is entered into.

Payment

The contract must state the manner of payment including how often, how much, and where the payment is to be made. Generally, the buyer has no right to prepay amounts under the contract, but this can be negotiated at the time of the agreement. Upon full payment of the purchase price, the buyer is entitled to receive a transfer of the ownership right to the real estate from the seller.

Notice of Default with Period to Cure

A critical issue is what the legal rights of the parties are, where there is a default by the buyer. The issue must be examined from each the seller and buyer's sides. Generally the installment sales contract will stipulate that "time is of essence" under the contract, meaning that if the buyer does not pay at the exact time that the payment is due, the buyer is in default and loses all rights and payments already made without further notice. This is expedient for the seller, but can cause extreme hardship for the buyer. The primary goal is to avoid disputes so that there can be an amicable resolution of the issue. Therefore, the buyer should include a clause in the contract whereby if there is a default, the seller will notify the buyer of the default and the buyer will have an opportunity to pay. A period of thirty days is customarily granted for curing any default and this is determined reasonable for both the buyer and the seller. If the buyer fails to repay within the period stipulated in the contract, the buyer will lose all rights in the real estate and all previous payments.

The seller should agree to such a reasonable clause, because the seller needs to reacquire possession of the land without resort to extreme and confiscatory methods. If the buyer fails to cure any default within a given reasonable timeframe, it is much more likely that the buyer will peacefully deliver up possession and relinquish all rights to the real estate.

Amounts Paid by the Buyer

Generally it is an acceptable practice that if there is a default, the seller is not obligated to transfer ownership rights. At this point, the buyer's rights are terminated and the seller keeps all payments that have been made under the contract. The seller also acquires any improvements made to the property and is not obligated to reimburse the buyer for any increase in the value of the property that has accrued over the contract period. However, if the contract does not specify in detail the rights of the parties in case of default, the ambiguity surrounding these issues might justify a court action to settle the rights and obligations of the parties. The seller should specifically set out in the contract that it will be cancelled, that the seller retains any improvements, and any increase in the value of the property inures to the seller.

However, if the buyer has paid a substantial amount of the purchase price, for example has paid two full years on a three year contract, termination of the contract can be a harsh result for the buyer. The buyer may desire to include provisions in the contract increasing the cure period after, say, one-half of the purchase price has been paid.

Waiver of Rights

The seller must be certain that if he accepts payments after the time to cure any default, that this is not considered an action of waiving all future rights to cancel and terminate the contract. The

seller should state in the contract that the acceptance of any payments after default does not constitute a change in the contract or a waiver of any rights under the contract.

Restitution for Breach by Seller

The buyer may find that after making full payment under the contract, the seller is unable to transfer the ownership. This can arise for many reasons, including arrest of the seller's rights, or the seller has transferred the ownership rights to someone else during the contract period. Or, in Egypt's case, the seller/developer never had title in the first place, but only an allocation of the land for development from the Ministry of Housing, Utilities and Urban Communities. The buyer needs to protect himself against such a possibility[36].

First, to protect the buyer, the contract itself should stipulate that the seller cannot transfer the ownership rights to a third party without the consent of the buyer and that any such transfer must include a restriction that the transferee agrees to be bound by the terms of the contract. This clause should state whether the buyer continues to pay the original seller or pays the transferee. Second, the buyer should require that if this clause is violated, the seller must repay the buyer the amounts paid under the contract, minus a reasonable rent amount.

Insurance

The contract must provide that the property is insured against casualty loss during the period of the contract. Usually the buyer agrees to maintain the insurance, because it stands to lose the most if there is damage to the property. The seller, however, has an interest in maintaining the value of the collateral, and insurance contribute to this purpose. The contract should state who will be the beneficiary of the insurance policy. A reasonable compromise is that both parties are the beneficiaries. In addition, the contract should state what must be done with the proceeds of the insurance policy. Must the proceeds be used to replace the damaged property or not?

Land Taxes

Common practice is that the buyer is responsible for payment of any land taxes as they become payable. However, the contract should state that if the buyer fails to pay the taxes that shall be considered a default under the contract. The seller may pay the taxes, plus any penalties, and add those amounts to the amounts owed by the buyer.

Disputes

Since the main advantage to the seller of an installment sales contract is a quick and simple means of securing the purchase price and a quick method of enforcement where there is a default, the contract should stipulate that if the seller must take the buyer to court to protect its rights, the seller is entitled to recover court costs and attorney fees from the purchaser.

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[36] In a meeting held October 11, 2005 at the Egyptian Housing Finance Company attended the following scenario was mentioned by Hala Adel Bassiouni, Chief Executive Officer. A problem that purchasers have with developers is that they will finance construction using a blanket construction loan secured by a mortgage on the whole project. They will then sell units to purchasers on installment sales contracts. When the contracts are paid off the developer will transfer title, but will not pay off part of construction mortgage with the payoff and consequently not get a release of the blanket mortgage on the sold and paid off unit. Alternatively, the developer will not own the land, but will only have an allocation of the land from the Ministry of Housing, Utilities and Urban Communities. When the purchaser makes payments to the developer no payment for the land is passed on the Ministry, After all payments have been made the developer will not acquire title to the land and pass it on to the buyer. This won't happen if potential purchasers finance through a finance company, because the developer will be paid in full out of the proceeds of the loan and the finance company will make sure that there is a proper conveyance from the developer and a release of the construction mortgage for that unit.

Installment Contracts in Egypt

In Egypt, from the limited information available, the developer is granted an allocation of land from the Ministry of Housing, Utilities and Urban Communities and then finances the construction of housing units with a blanket construction mortgage. The developer then sells units to purchasers on installment sales contracts. If the EFS project intends to proceed with recommendations that mortgage finance companies purchase installments sales contracts from developers, there needs to be a thorough investigation regarding the structure of the transactions and the relative rights and remedies of the sellers and purchasers.

As individual units are created and sold by the developer together with an agreed-upon fractional share of the land upon which the apartment building has been built[37], the installment sales contracts with the purchasers should be shown as notations and as encumbrances against the respective apartment real estate units and the land real estate unit. When all payments to the developer have been made for the apartment, and assuming the developer has paid off the installments to Ministry of Housing, Utilities and Urban Communities for the land as agreed, ownership of the land should be transferred to the developer who then transfers ownership to the apartment purchaser for the apartment real estate unit and the agreed-upon fractional share of the land. A release of the construction mortgage is obtained and annotated in the registry for the apartment real estate unit. This should result in a blue deed for the real estate unit and fractional share in the land showing the apartment purchaser as owner with no encumbrance for either installment sales contract or the construction mortgage.

It appears that no installment sales contracts in the new communities have, in fact, been registered, and there is no indication how such transactions would be dealt with by the REPD. Given the fact that the REPD has such problems understanding mortgage finance transactions, as discussed earlier in this report, there is little likelihood that the REPD will have a unified well-considered method for the registration of these transactions.

If the EFS Project proceeds with the recommendation that installments sales contracts be purchased by mortgage finance companies, the method for registering such transactions will have to be researched and perhaps assistance will need to be given to develop appropriate procedures.

A problem down the road is going to be enforcing mortgages where there is a default. There is little trust at this point that the courts will be willing to enforce the mortgage according to their terms.

Mortgage Default

The enforcement of mortgages in case of default in Egypt is quite a bit more restrictive than the enforcement of installment sales contracts is likely to be. For the sake of this report, it only needs to be mentioned that the Mortgage Finance Law of 2001 incorporates many "protections" for the borrower, and in fact ultimately requires foreclosure proceedings that monitored and controlled at every juncture by the courts. The law has notice and cure provisions, mentions writs of execution, appraisals, and approval of sale by the court[38]. It is not the intention here to give an in depth analysis of foreclosure requirements in Egypt[39]. As of yet, there have been no defaults and there is no indication of how mortgage foreclosure will proceed. The EFS Project has no information as to experience with defaults in the case of installment sales contracts.

[37] It is not necessarily the case that the land will also be a part of such a transaction, but for the sake of this example, and the next describing mortgage financing we will assume that it is.
[38] Mortgage Finance Law (2001) Part IV p. 16 *et seq*.
[39] For a basic analysis See EFS Technical Report #28 "Review and Analysis of Foreclosure and Real Property Law", Albert, December 22, 2005.

The important point for the project recommendation that mortgage companies purchase installment sales contract from developers is that the protections to a borrower/purchaser under the mortgage foreclosure provisions of the Mortgage Finance Law of 2001 are likely to be much greater than the protections to a purchaser under an installment sales contract. This has implications for the mortgage lenders, and might be used as a marketing tool to go about substituting mortgage finance for installment sales finance mechanisms. The project could recommend an alternative to approaching developers to buy their portfolios. As an alternative, the mortgage companies can approach purchasers and market financing that would pay off the installment sales contracts. The mortgage companies are already aware of this possibility[40]. Thus, the substitution of mortgage financing for installment sales financing can be approached from two different directions; 1) approach developers and purchaser their portfolios, and 2) market to the purchasers themselves.

In either case, the project needs to learn much more about the installment sales contracts in use in Egypt. It needs to understand the structure of the contracts, the rights of the seller to enforce, the rights of the purchasers, and it needs to know how the REPD either already handles such contracts, or how it intends to handle them. Only then can a strategy for implementing the substitution of mortgage financing for installment sales contracts be properly planned.

List of Appendices

Appendix 1: Paper of Registration System Guarantees

Appendix 2: Paper on Title Insurance

Appendix 3: Gaynor Memorandum: Registration of Mortgages

[40] October 22, 2005 meeting at the Egyptian Housing Finance Company.

Appendix 1

Title Registration Guarantees

General Principles

Title registration systems provide for the protection of rights in real estate by guaranteeing:

1) that the register reflects the current status of title (mirror guarantee),

2) that the current register is the sole source of title information and that no other source, particularly historical real estate records, need be consulted in determining ownership and current encumbrances (curtain guarantee), and

3) often, though not always, that the government will reimburse persons suffering loss caused by errors, omissions, or misfeasance of the Registrar under legislatively defined conditions (indemnity guarantee).

Boundaries may or may not be guaranteed, but where they do exist, there are special procedures that must be followed. Although the issue would have to be researched for a specific jurisdiction and possibly even specific parcels, it is probably the case that boundaries are generally not guaranteed.

Guarantee Limitations and Exceptions

There are, however, limitations to the title registration guarantees. Title systems guarantee that the persons named as owners have an indefeasible title to the ownership as set out in the register. Also, the systems guarantee that only that information disclosed by the register affects the title. One also need not make inquiry regarding external facts or prior transactions in determining the owner. Thus, title registration systems provide certainty and reliability.

However, registration systems usually do not guaranty the validity of rights less than ownership that are shown in the register. For example, where the register discloses a mortgage, there is typically no guarantee that the mortgage is valid and enforceable, because its validity and enforceability depend upon facts that are not part of the record (no debt, violation of consumer protection laws, usury, and so on).

Indemnity and Assurance Funds

The indemnity guarantee is of secondary importance and not a necessary feature of title registration systems. The most important protection to persons using the registry comes from the professionalism of the specialists operating the system and the protections of very effective statutes of limitation.

Some jurisdictions establish an assurance fund out of which claims can be paid, customarily allocating a small portion of the fees for the purpose. But a specific provision is absent in the title registration law, a person can likely make a claim under general tort law for errors, omissions, and misfeasance of the Registrar's office. Such claims would be recognized only if sovereign immunity has been waived, and are subject to the same defenses to which any tort claim would

be subject. These would include no reliance on the registry by the claimant, contributory negligence, assumption of the risk, running of the statute of limitations, and the like. Such claims would be paid from the general budget.

In most jurisdictions, a person cannot recover for claims arising out of his own fraud, negligence, or intentional misfeasance, and the amount of any recovery is limited to the value of the right at the time of the error, omission, or misfeasance of the Registrar.

Other specific exceptions in registration laws are quite numerous and complicated. Furthermore, the standards and burdens of proof of claim very widely from jurisdiction to jurisdiction. One statute might deny liability for "substantial" negligence on the part of the claimant, whereas another statute might deny coverage where the claimant has exhibited any negligence at all.

Title Registration Systems and Title Insurance

The monetary assurances of title registration systems and title insurance cannot easily be compared.

Because of the affirmative guarantee of ownership and the guarantee against "off record" matters, title defects in title registration jurisdictions are very rare. Thus, the additional cost of title insurance premiums for an owner's policy of title insurance is not justified by any benefit.

Where there are claims, the same defenses usually apply to both claims against any assurance fund and claims under a policy of title insurance, though burdens of proof may be very different.

Most claims against title insurance in title registration jurisdictions do not involve errors, omissions, or malfeasance of the Registrar, but rather cover negligence or errors of the title company itself, such as a delay in registering the insured rights. This is often referred to as gap insurance, and does provide protection between the time of settlement and registration, but this is not coverage for a title defect. It is often cited by title insurance companies in marketing its insurance product. However, a person suffering loss is such cases can most likely recover for the negligence of the title company for its delay in registration even where no policy is purchased.

Title policies do not provide coverage for matters created, suffered, assumed, or agreed to by the insured. No claim can be made against an assurance fund where there has been fraud, negligence, or intentional misfeasance by the claimant. The burdens of proof may be quite different.

Title insurance policies are contracts of adhesion, which means that they would be strictly interpreted against the insurance company in favor of the policy holder in case of ambiguity. Guarantees by the state, on the other hand, are often construed in favor of the government to avoid liability where this would be reasonably done by the courts.

In the rare case where there is a claim paid under a title insurance policy for a title defect, the title insurance company is subrogated to the rights of the insured and may make a claim against the title system. This claim will be subject to the same defenses that can be asserted by the insured.

Title insurance policies contain a duty to defend the insured against claims, which is actually broader than the coverage under the policy. This means that the insurance company must defend an insured title against matters, such as spurious claims, that ultimately wouldn't be covered by the policy. There is no similar protection afforded by title registration systems.

Appendix 2

Overview of Title Insurance

General

Title insurance is a type of protection for real estate title defects in the form of an insurance policy issued where the insurer agrees:

- to reimburse loss or damage resulting from an undiscovered defect in title,
- to an owner, lessee or mortgagee,
- for matters covered in the policy,
- as of the date of the policy, and
- not exceeding the policy amount.

A title policy is not a guaranty of title, but only provides for reimbursement if title is not as stated in the policy and the amount recoverable can never exceed the policy amount. In this regard, it is no different than other types of insurance. An insured under a title policy certainly does not want to have a claim arise, any more than does a person who has casualty insurance want his house to burn down.

Two basic title insurance products have developed;

1) loan policy, and
2) owner's policy.

The reason for two different types of policies is that coverage

- varies widely under each type of policy, and
- the risks of liability to the insurer are vastly different.

Loan Policy

Importantly, the loan policy insures only the lender, not the owner, though the premium is always paid for by the borrower/owner. A loan policy generally covers loss by reason of title being vested in someone other than the person named in the policy, title defects as enumerated in the policy, liens for real estate taxes or assessments, and lack of access. It also insures against the invalidity or unenforceability of the lien of the insured mortgage.

The insurer only incurs liability under the loan policy if there is:

- a default in the mortgage,
- the lender forecloses,

- and the lender suffers loss on account of a covered risk.

In other words, there is no liability to the insurer under the policy if there is a title defect unless the lender forecloses and cannot recover the amount of the loan from sale of the property. Even if defects reduce the sales price, if the lender recovers the loan amount from the sales proceeds there is no liability on the part of the title insurance company. This is true even if the lender may have realized more from the sale absent the defect.

Owner's Policy

An owner's policy will basically reimburse the owner for any loss incurred if title is otherwise as shown in the title policy, there is no public access, or the title is unmarketable.

Under an owner's policy the title insurance company will incur liability for any covered defect, because such title defects will always cause the owner loss or damage in the form of a reduced sales price or the cost of clearing the title when the owner/insured goes to sell the property. Title companies will therefore list as exceptions to the owner's policy, matters that they generally will not show in loan policies.

Both Policies

The title insurance company reduces its risk by listing known exceptions to the policy in Schedule B, and further reduces its risk through exclusions to the policy and by conditions attached to the policy.

The most significant exclusion covers matters created, suffered, assumed, or agreed to by the insured. Also excluded are matters known to the insured, not known by the title insurance company, not of public record, and not disclosed to the title insurance company in writing. Thus, an insured cannot hide a defect that it knows about, not known to the company, and then make a claim based upon the defect.

The Schedule B Exceptions are the most significant limitation to the liability of the title insurance company, because it is here that the title company lists as exceptions to the policy encumbrances that appear of record against the property. Schedule B will list easements, covenants, conditions and restrictions, prior liens or mortgages and other encumbrances that appear of record. If a matter appears in Schedule B and the insured suffers loss or damage by reason of one of these items there is no title insurance coverage for the loss or damage.

The primary reason that title insurance developed in the United States is that it created a uniform "title search" and product for the secondary mortgage market. The secondary mortgage market prefers coverage from a financially responsible company for potential title defects in a form that is uniform across the nation to the individual, localized lawyers' title opinions that had been the traditional form of title assurance.

Loan policies are required by all lenders and therefore drive the market in the United States, since secondary lenders will not purchase mortgages that are not covered by a lenders title policy. Owner's coverage might be added for a particular transaction if the owner so desires for the payment of an additional premium. The owner/mortgagor pays for both policies, but has no coverage unless an owner's policy is issued. Only the lender can claim against the loan policy.

Title insurance is required by lenders whether or not the system is a deeds system or a true title registration system, because of the lender's desire to sell its secured loans in the secondary

mortgage market. Without a secondary mortgage market and assuming a decent title system, there is little need, if any, for title insurance.

Attached are the Standard ALTA Loan Policy, the proposed ALTA Residential Owner's Policy, and Short Form Residential Lender's Policy and the ALTA Commitment Form.

Appendix 3

MEMORANDUM

TO: **DOUGAL MENELAWS**

CC: **JUSTIN T. HOLL, JR.**

FROM: **RICHARD GAYNOR**

DATE: **FEBRUARY 16, 2006**

SUBJECT: **OBSTACLES TO REGISTRATION OF MORTGAGES IN *SIGUEAL EL-SHAKSI***

Various lenders, including the Egyptian Housing Finance Co. (EHFC) and Taamir Mortgage Company (TMC), are making housing finance loans, albeit fewer than desired, despite great difficulties in registering their mortgages. Some lenders are assuming considerable risk by disbursing funds to borrowers even before documents are registered, a practice that most Western commercial lenders would never consider. According to some Egyptian lenders, it can take years to complete registration even with constant pushing by knowledgeable in-house lawyers.

You have proposed some mechanisms to try to reduce lender risks in these situations and to create incentives to speed up registration (such as use of agents/facilitators to marshal backlogged registrations, and retention of 5% of the loan proceeds pending registration). These measures would be a step forward and should be combined with efforts to identify and eliminate the obstacles to registration.

This Memorandum is intended to provide you and Justin with some additional thoughts on registration of mortgages. Even if you have heard some of these ideas before, perhaps this Memorandum will help you present the issues to others. Justin, of course, may incorporate any of this into his work as he sees appropriate. I focus entirely on registration of mortgages in *Sigueal El-Shaksi* because that is the system in use in all urban areas where the EFS project is currently working.

In Sigueal El-Shaksi, "registration" of a mortgage means making a marginal notation on the *sanad el-mulkaya*[41] held by the property owner indicating that the mortgage exists as an encumbrance against the property. "Registration" of a mortgage usually involves a variant of one of the following three scenarios, each of which presents different challenges.

Scenario 1. Borrower holds *sanad el-mulkaya* and there is no proposed change of ownership.

In this Scenario, the borrower already holds a *sanad el-mulkaya* and simply wants to obtain a loan and register the mortgage against the property. There is no proposed change of ownership so the transaction involves only two parties, the borrower and the lender. Registration is accomplished by making a marginal notation on the *sanad el-mulkaya* showing that the mortgage exists as an encumbrance against the property.

It is my impression that this type of transaction, while not common, has been occurring for years and is well known to staff at the registration offices. One employee at the Northern Cairo central registration office said that such transactions do not present significant problems for them and are relatively "routine."

The only significant hurdle to registration in these cases is the requirement for ESA to conduct a field investigation. As far as I can determine, the ESA field investigation is not required by

[41] The "sanad el-mulkaya is the laminated blue "deed" that is the final evidence of registration in the Sigueal El-Shaksi (deeds) system. It is sometimes referred to as a "title" although technically speaking it does not provide the same legal assurance as provided by a title in a true registration of title system.

any Law. If it is legally required, the requirement stems from regulations or instructions of REPD or ESA. ESA conducts its field investigation even in cases when the property description in the *sanad el-mulkaya* is identical to the property description in the loan documents. From a logical standpoint, a field investigation should not be required in such cases because the lender is getting a security interest in exactly the property that is owned by the borrower. (It should be noted that the borrower could not have obtained a *sanad el-mulkaya* in the first instance without ESA having conducted a field investigation at the time the s*anad el-mulkay*a was issued.) The only rationale offered for the field investigation is that ESA needs to verify that the property description matches the reality on the ground. In other words, ESA inspectors verify, for example, that if the property is described as having two floors, it is not, in reality, three floors. Arguably, this type of inspection is unnecessary and inappropriate. Lenders are fully capable of conducting their own due diligence to inspect the collateral to verify that it complies with applicable zoning and building laws.

In any case, since the field investigation is not required by any Law, it can be eliminated by Regulation or Instruction issued by the appropriate body (MOJ or REPD).

If the inspection requirement were to be eliminated, registration of a mortgage in a case in which the borrower already holds a *sanad el-mulkaya* should be relatively straightforward and should involve the following steps:

- Estimate the property value (which is done relatively quickly by REPD using set formulae), and verify payment of necessary registration fees;
- Verify that the property descriptions in the *sanad el-mulkaya* and the mortgage documents are the same;
- Verify that the borrower is the owner shown on the *sanad el-mulkaya*;
- Verify that there is nothing in the *sanad el-mulkaya* that prohibits mortgage of the property;
- Verify that the loan documents were signed by the person claiming to be the owners and borrower (i.e., that the signatures are notarized); and
- Enter the necessary marginal notation on the *sanad el-mulkaya*.

In theory, a trained specialist should be able to complete this process in an hour or two. There are some logistical issues that complicate the situation – like having to hand write the notation on the *sanad el-mulkaya* and re-laminate it, etc. – but that should not add more than a week to the process.

From my perspective, which is admittedly subject to oversimplification, eliminating delays in Scenario 1 cases is solely a function of political will, and training REPD staff to make registration happen quickly. There are no significant legal or conceptual bottlenecks.

Scenario 2. Purchase money sale – Seller holds sanad el-mulkaya.

In this Scenario, the seller holds a *sanad el-mulkaya*, and is selling the property to a buyer/borrower who is obtaining a purchase money loan from a lender pursuant to a tripartite agreement. This is the scenario contemplated by the Real Estate Finance Law (Law No. 148 of 2001).

Although this Scenario is almost identical to the Scenario 1 – the only difference being that there is a tripartite agreement and a change in ownership – the registration office treats the two situations completely differently, and has almost no experience registering this type of transaction. The registration office even calls the two transactions by different names: they call the transaction in Scenario 1 a “mortgage,” and the transaction in Scenario 2 a “mortgage finance.”

One employee at the registration office summarized her perception of the differences between "mortgage" and "mortgage finance" as follows:

- mortgages involve two parties, whereas mortgage finance transactions involve three, the seller, buyer, and lender (as required by the Real Estate Finance Law);
- mortgage applications are submitted at the local registration office (RO) whereas mortgage finance applications are submitted at the central registration office[42];
- mortgage applications are forwarded to the EDO, whereas mortgage finance transactions do not require ESA involvement[43];
- the parties to a mortgage finance transaction go to the notary office first and then submit their application for registration, whereas mortgages are not notarized until the end of the process;
- mortgages have been common for a long time and the registration office knows how to register them, whereas mortgage finance transactions are new based on the Real Estate Finance Law.

In effect, the Real Estate Finance Law, by creating a new and previously unknown tripartite instrument (the "mortgage finance agreement"), threw the registration office into confusion because there were no regulations or instructions governing "mortgage finance." The Real Estate Finance Law created a new animal with a new name, which from a bureaucrat's perspective created the need for new regulations and instructions even though conceptually there should be almost no difference between a "mortgage" and "mortgage finance." The fact that registry employees call them by different names is in itself an indication that they do not fully grasp the concepts.

Again, eliminating the roadblocks to registration of "mortgage finance agreements" in Scenario 2 is largely a matter of political will and training. If the seller holds a valid *sanad el-mulkaya* that is submitted with the tripartite "mortgage finance agreement," the seller, buyer and lender have all signed the tripartite agreement before a notary, the seller has signed a document conveying the property to the buyer, and the property descriptions in all the documents match each other, registration should be straightforward, involving more or less the same steps described above in Scenario 1. Making it happen might require issuance of clear instructions by the Ministry of Justice and training.

Scenario 3. Neither Seller nor Borrower has *Sanad el-mulkaya*.

In this case, the property has never been entered in the *Sigueal el-shaksi* system. Therefore, registration of the mortgage, by definition, also necessitates registration of the underlying ownership of the property. By some estimates, 90% of the urban property falls in this category, greatly limiting the pool of properties available for mortgages.[44]

There are two solutions to this problem. The first is to conduct systematic first registration thereby converting urban areas to *Sigueal El-Ainee* (title registration) and registering large numbers of properties on a mass basis. The project is obviously working on that.

In the absence of introduction of *Sigueal El-Ainee*, solutions have to focus on improving *Sigueal El-Shaksi*. The bottlenecks in registration in *Sigueal El-Shaksi*, as well as possible solutions, vary depending on whether the property is in an old urban area or one of the New Urban Communities.

[42] This is because the Real Estate Finance Law specifies that applications for mortgage finance should be submitted at the central office, not the local RO. The rationale for this distinction is unknown although in theory it could make registration of mortgage finance go more quickly because the original of the *sanad el-mulkaya* on which the marginal notation will be made is housed in the central office.

[43] It is unclear why registrations of mortgages require ESA field investigation, but that issue was addressed above in the discussion of Scenario 1.

[44] In a recent presentation, Chairman Saleh of the MFA referred to the small pool of registered properties as one of the principal obstacles to generating increase mortgage finance activity.

New Urban Communities

In theory, registration in the new urban communities should be relatively straightforward because the chain of title that needs to be proven should be relatively short and well-documented. In most cases, there should be only one or two links in the chain: from the New Urban Communities Authority to the developer, and from the developer to the buyer.

As I understand it, the principal problem with registration in the New Urban Communities arises out of the nuances of land ownership. In most cases, land in the New Urban Areas is owned by the New Urban Area Authority (NUAA). The NUAA allocates the land to developers who do not receive title to the land until they make all installment payments and satisfy all other conditions imposed by the NUAA. Although developers sell apartments to buyers, the registration office will not register the apartment in the name of the buyer unless the developer owns an interest in the land. It is unclear whether there is a valid legal rationale for the registry's refusal to register in these cases. I would venture to guess that if a legal rationale exists, it could be overcome by a more flexible interpretation of law and/or amendments to REPD regulations or instructions. This is an issue that Justin could explore further.

To the extent there is a valid legal hurdle, it should be relatively straightforward to recommend ways around it. For example, REPD could register the apartment by indicating in the property description on the *sanad el-mulkaya* that the apartment owner owns the apartment, plus a common right to use the land parcel underneath the building for access to the apartment and support of the building along with all other rights conferred by law or contract.

I understand from Shamsnoor that the new Minister of Housing is aware of the land problem and has proposed changing the land allocation process so that in the future land will be conveyed to the developer at the outset. The status of this proposal is unclear. It is also unclear whether it would apply retroactively to land that has been previously allocated. The EFS project and USAID should support the Minister's proposal and should advocate applying it retroactively if that is not already his intention.

Retroactive conveyance of land to developers would free up a huge pool of apartments that could be registered and would then become candidates for mortgage finance. Registration of these apartments should be relatively straightforward because the chain of title is short. Moreover, there are at least two sources of ownership information that could provide the basis for registration. The NUAA keeps a registry in which apartment owners can have their interest in the land recorded. These registries are said to be reasonably accurate but cover only a small percentage of the apartments because apartment buyers are reluctant to pay the 10% fee required to have their interest in the land recorded. The source of more comprehensive information is the developers who are said to retain very accurate records of their buyers, especially buyers who bought using installment sales contracts.

Older Urban Areas

The process of registering older urban properties in *Sigueal el-Shaksi* has been well-documented.[45] Suffice it to say that it is a long and expensive endeavor. The GOE's long-term strategy is to convert all urban areas to *Sigueal El-Ainee*, but in the short run there has to be reform of the procedures and workflow in the *Sigueal el-Shaksi* system. My report of April 2005 contained some recommendations, including:

- Standardize application forms and post information in registration offices so that applicants understand the procedures and know which documents to submit with their applications.

- Put notaries in registration offices so that parties to a transaction do not have to go to a separate office to have their documents notarized.

- Notarize contracts at the beginning of a transaction – in the *Sigueal el-Shaksi* system, final contracts are not notarized until the very end of the transaction. There is no need for this and, in fact,

[45] See, e.g., my Report of April 2005 and the Inception Report.

tripartite mortgage finance agreements are notarized at the beginning of the process. This should be the case for all transactions.

- Submit CIF and Mutation Form with application – the CIF and Mutation Form are maintained by the ESA district office (EDO). Much of the delay in registration is caused by the back and forth between the registration office and the EDO as the applicant tries to get the necessary information from the EDO. This could be eliminated by asking the applicant to obtain the CIF and a copy of the Mutation Form first so that the RO would have all it needs to process a transaction.

- Refer cases to the EDO when there is a division or merger of the property – if the property descriptions in all the documents are consistent, there should be no need for any EDO involvement.

- Post jurisdictional maps in ROs – most ROs do not have maps showing their jurisdictional boundaries causing an applicant to have to go to the EDO to confirm which RO has jurisdiction over his or her property.

- Divorce registration from enforcement of other laws – registration is delayed by requirements that applicants prove compliance with tax, building and planning laws before registration. Enforcement of other laws should be divorced from registration.

- Streamline – the registration process involves incredible amounts of duplication and overlap, with various technical investigators reviewing documents already reviewed by others, and repeating work already done by others. Most of this duplication is unnecessary and could easily be eliminated.

The bottom line, at the risk of being repetitive, is that streamlining the process and making it more user-friendly should not be difficult. It could be done relatively easily if the political will existed.